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July 27, 2020

Via Email and First Class Mail

Hon. Darlene Heep
Administrative Law Judge
Public Utility Commission
801 Market St., Suite 4063
Philadelphia, PA 19107

Hon. Marta Guhl
Administrative Law Judge
Public Utility Commission
801 Market St., Suite 4063
Philadelphia, PA 19107

Re: PA Public Utility Commission v. Philadelphia Gas Works
Docket No. R-2020-3017206

Dear Judges Heep and Guhl:

On behalf of Philadelphia Gas Works (“PGW”), enclosed please find PGW’s Answer to the Motion by the Sierra Club, PA Chapter and Clean Air Council (the “Environmental Stakeholders”) to exclude portions (“Contested Portions”) of the rebuttal testimony (PGW St. No. 12-R) of PGW witness James Cawley (“Commissioner Cawley”) in the above-captioned proceeding. A copy of this letter is being served as indicated on the attached Certificate of Service.

If you have any questions, or require additional information, please feel free to contact me at your convenience.

Sincerely,

Daniel Clearfield

Daniel Clearfield
DC/scs

Enclosure

cc: Rosemary Chiavetta, Secretary w/enc.
Certificate of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing document upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: July 27, 2020

Daniel Clearfield

Daniel Clearfield, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION	:	Docket No. R-2020-3017206
	:	
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	

**ANSWER OF PHILADELPHIA GAS WORKS
TO THE MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE
REBUTTAL TESTIMONY OF PGW WITNESS JAMES CAWLEY
BY THE ENVIRONMENTAL STAKEHOLDERS**

Philadelphia Gas Works (“PGW” or “Company”) hereby files this Answer to the Motion by the Sierra Club, PA Chapter and Clean Air Council (the “Environmental Stakeholders”) to exclude portions (“Contested Portions”) of the rebuttal testimony (PGW St. No. 12-R) of PGW witness James Cawley (“Commissioner Cawley”) in the above-captioned proceeding (“Motion To Strike”).

The Environmental Stakeholders’ Motion to Strike should be denied because it misconstrues and misrepresents the rebuttal testimony by Commissioner Cawley. As explained in more detail below, PGW has fully complied with 52 Pa. Code § 5.243 regarding the scope of rebuttal testimony. Commissioner Cawley generally responded to the policy-based arguments of OCA witness Scott Rubin, OSBA witness Robert Knecht and Environmental Stakeholders witness Dr. Ezra Hausman.¹ Notably, in response to Dr. Hausman – who seeks to have the Commission direct the Company to produce a Climate Business Plan (“CBP”) “for reducing and ultimately eliminating its sales of natural gas.”² – Commissioner Cawley gave information on the

¹ PGW St. 12-R at 3.

² Environmental Stakeholders St. 1 at 28-29.

underlying legal context and opined that the Pennsylvania Public Utility Commission (“Commission” or “PUC”) should not adopt (as a policy matter) the recommendations of Dr. Hausman.³ Such testimony is well within the permissible scope of appropriate rebuttal testimony in a regulatory proceeding and serves to provide a context to assist the presiding officers and the Commission to understand Commissioner Cawley’s recommendations as to the appropriate policy that the Commission should follow. Accordingly, and as explained herein, the Environmental Stakeholders’ Motion to Strike should be denied.

I. INTRODUCTION AND BACKGROUND

On February 28, 2020, PGW filed tariff supplements seeking a general rate increase calculated to produce \$70 million (10.5%) in additional annual revenues. By Order entered April 16, 2020 (“Suspension Order”), the Commission instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. The litigation schedule was adopted on May 15, 2020.⁴

On June 1, 2020, the Petition to Intervene⁵ of the Environmental Stakeholders was granted.⁶ In that Petition, the Environmental Stakeholders explained that would they seek to ensure that environmental and energy efficiency issues would be adequately considered by the Commission.⁷

The Environmental Stakeholders filed the written direct testimony of Dr. Ezra Hausman on July 15, 2020. In his direct testimony, Dr. Hausman generally contends (or intimates) that

³ See PGW St. 12-R at 34-39.

⁴ Corrected Prehearing Order dated May 15, 2020 at Ordering Paragraph 17.
<http://www.puc.state.pa.us/pcdocs/1663320.docx>

⁵ <http://www.puc.state.pa.us/pcdocs/1663977.pdf>

⁶ Order Granting Petition To Intervene Of Environmental Stakeholders dated June 1, 2020.
<http://www.puc.state.pa.us/pcdocs/1664803.docx>

⁷ *Id.* See also Environmental Stakeholders’ Motion to Dismiss Objections and Direct Answers to Interrogatories of the Environmental Stakeholders (dated June 12, 2020).
<http://www.puc.state.pa.us/pcdocs/1666344.pdf>

PGW, as a natural gas distribution company, is operating unreasonably because it allegedly has not recognized that its continued operation is contributing to global warming and the emission of greenhouse gases. Dr. Hausman seeks to have the Commission direct PGW to develop a plan to anticipate a time when PGW is required to end the burning of fossil fuels and stop selling natural gas.⁸

In accord with the Scheduling Order, PGW filed written rebuttal testimony of Commissioner Cawley and others on July 13, 2020. In his rebuttal testimony, Commissioner Cawley responds, *inter alia*, to the policy arguments (for denial of a rate increase) presented by Dr. Hausman.

The Environmental Stakeholders' Motion to Strike was filed on Thursday, July 23, 2020. In accord with the Scheduling Order, Environmental Stakeholders submitted the surrebuttal testimony of Dr. Hausman (Environmental Stakeholders St. No. 1-SR) on Friday, July 24, 2020. That surrebuttal responds to Commissioner Cawley.

II. LEGAL STANDARD

The Pennsylvania Public Utility Code at 66 Pa. C.S. § 332(c) entitles every party “to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”⁹ Evidence will not be permitted to be introduced during the rebuttal stage if it: “(1) Is repetitive; (2) Should have been included in the party's case-in-chief; (3) Substantially varies from the party's case-in-chief.”¹⁰

⁸ Environmental Stakeholders St. 1 at 28-29.

⁹ 66 Pa. C.S. § 332(c).

¹⁰ 52 Pa. Code § 5.243(e).

III. PGW’S ANSWER TO THE ENVIRONMENTAL STAKEHOLDERS’ MOTION TO STRIKE

The Environmental Stakeholders’ Motion to Strike should be denied because it misconstrues and misrepresents the rebuttal testimony by Commissioner Cawley. PGW certainly has a right to respond to Dr. Hausman and Commissioner Cawley’s testimony is proper rebuttal. Specifically, Commission Cawley’s rebuttal testimony responds to the policy arguments (for denial of a rate increase) presented by Dr. Hausman. PGW is entitled to present its own policy witness to refute the policy-based claims of the Environmental Stakeholders. His references to the legal principles that apply to Dr. Hausman’s claims were clearly designed to provide context for his opinions on the policy that the PUC should follow with respect to these issues.

A. Commissioner Cawley’s Rebuttal Testimony Is Relevant And Should Be Admitted.

Commissioner Cawley addresses the claims made by Dr. Hausman and the recommendations made by him. Notably, Dr. Hausman states that PGW should “be directed to produce a CBP for reducing and ultimately eliminating its sales of natural gas.”¹¹ That expresses a policy-based argument to deny PGW’s requested rate increase at this time. Commissioner Cawley evaluated the context of the policy-based recommendations made by Dr. Hausman. Commissioner Cawley’s views on those recommendations were appropriately made in his rebuttal testimony. His views and opinions are not objectionable even if they embrace an ultimate issue.¹²

Commissioner Cawley’s rebuttal testimony should be admitted because it is relevant and has reasonable probative value to the policy arguments being made by Dr. Hausman. The Environmental Stakeholders have described their positions as being within “a dynamic legal and

¹¹ Environmental Stakeholders St. 1 at 28.

¹² Pa. Rule of Evidence No. 704.

policy context on the viability, reasonableness, and prudence of its contemplated investments.”¹³ Dr. Hausman, as noted, made policy-based recommendations and concluded that the requested rate relief should be denied. Having raised policy-based recommendations, the Environmental Stakeholders now (improperly) seek to foreclose opposing policy views. The Environmental Stakeholders argue that responses expressing opposing views are “not relevant,”¹⁴ since they do not contribute “to the development of the factual basis in this case.”¹⁵ Given the policy-based arguments presented by Dr. Hausman, that is not the appropriate standard. PGW has the right to respond on a policy level, since Dr. Hausman raised policy level arguments. Commissioner Cawley is an acknowledged expert on PUC regulatory policy and his views are relevant to the Commission’s consideration of these issues. Of course, the Commission is free to “give the testimony the weight it deserves” when evaluating these various arguments. But, while PGW can and will make the case in its Brief that Dr. Hausman’s demands cannot legally be granted by the PUC, if the testimony is stricken, the Company will not be able to share the policy recommendations of an acknowledged expert in regulatory policy.

Admitting Commissioner Cawley’s policy testimony is also consistent with Commission precedent and its role as a policy-making body to allow testimony based on policy considerations, even if the testimony does not contribute to the factual basis in the case.¹⁶ Just

¹³ Environmental Stakeholders’ Motion to Dismiss Objections and Direct Answers to Interrogatories of the Environmental Stakeholders, dated June 12, 2020 at 10. <http://www.puc.state.pa.us/pdocs/1666344.pdf>.

¹⁴ Motion to Strike at 5-6.

¹⁵ Motion to Strike at 6.

¹⁶ See e.g. *In Re: Application of Trans-Allegheny Interstate Line Company* (“TrAILCo”), Docket Nos. A-110172, *et. al.*, Recommended Decision (Aug. 15, 2008) (“The testimony or statements is/are very general in nature and concerned policy considerations, not any specific factual situation in the present case. As such, the objections of TrAILCo are overruled and the testimony allowed [...]”). Of note, the referenced testimony in the TrAILCo case pertained to statements made at a Public Input Hearing by the conservation chair for the Pennsylvania Chapter of the Sierra Club on behalf of persons who were unable to attend the hearing.

last year, Administrative Law Judges Elizabeth H. Barnes and Andrew Calvelli rejected a similar motion to strike filed against policy testimony submitted by Commissioner Cawley.¹⁷

PGW submits that, in the interest of judicial economy, all of the Contested Portions of Commissioner Cawley's rebuttal testimony must be retained in the record so that the issues raised by Dr. Hausman and opposed by PGW may be fully considered by the ALJs and the Commission, giving it whatever weight they determine it deserves.

B. Commissioner Cawley's Rebuttal Testimony Offers Policy Opinions, Not Legal Testimony

In its Motion, the Environmental Stakeholders seek to strike the Contested Portions of Commissioner Cawley's rebuttal testimony on the basis that the testimony contains conclusions of law and is therefore improper.¹⁸

As noted, the Environmental Stakeholders mischaracterize Commissioner Cawley's rebuttal testimony. His testimony is not offered as legal testimony. Rather, Commissioner Cawley's rebuttal testimony relates to his view of the Commission's policy. His analysis is based on his experience as a former Commissioner and understanding of the Commission's role as a regulator and Commission policy. His discussion of the underlying context is limited to offering his opinion regarding whether the Commission's should adopt the policy recommendations being advanced by Dr. Hausman.

Most importantly, Commissioner Cawley's testimony is responsive to issues raised in the direct testimony of Dr. Hausman on behalf of the Environmental Stakeholders. Dr. Hausman expressed policy-based arguments to deny PGW's requested rate increase at this time. As explained in more detail below, Dr. Hausman relies on legal authority to support his testimony.

¹⁷ See, ft. 29, *infra*.

¹⁸ Motion to Strike at 6.

For example, Dr. Hausman cites and relies upon an Executive Order from Governor Wolf¹⁹ and a Resolution passed by the City of Philadelphia.²⁰ He opines that PGW should act in accord with those authorities.²¹ To do this, Dr. Hausman recommends adoption of a CBP. He supports that recommendation by pointing to actions and orders from other jurisdictions.²² **That is no different than Commissioner Cawley explaining the underlying legal context supporting his position that PGW, among other things, should not be required to adopt a CBP.**

It is common in Pennsylvania for witnesses to offer testimony regarding a party's position or interpretation of issues related to the applicable law and policy in proceedings before the Commission. For example, in *PUC v. Philadelphia Suburban Water Co.*,²³ the OCA moved to strike portions of testimony regarding consolidated tax adjustment issues presented by a witness, a practicing attorney, on the basis that the testimony was legal opinion and argument.²⁴ “[T]he ALJ admitted the bulk of the testimony” and only struck the “limited portions which he determined to be speculative.”²⁵ On review of the ALJ's decision, the Commission considered, at length, the witness's testimony on the interrelationship between consolidated tax adjustments and the Internal Revenue Code normalization provisions, including his summary of the applicable statutes and regulations.²⁶ Although the Commission ultimately disagreed with the witness's position on whether a consolidated tax adjustment should be made, it is undeniable that the Commission fully considered his analysis in rendering its decision. The ALJs and the Commission should have the same opportunity here.

¹⁹ See Environmental Stakeholders St. 1 at 8-9, 10, 29; Environmental Stakeholders St. 1-SR at 8.

²⁰ See Environmental Stakeholders St. 1 at 9-10, 14-15, 22; Environmental Stakeholders St. 1-SR at 8.

²¹ Environmental Stakeholders St. 1 at 10-11. In his surrebuttal testimony, Dr. Hausman also speaks of compliance with “climate regulations” See Environmental Stakeholders St. 1-SR at 1-6.

²² See Environmental Stakeholders St. 1, Exhibit EDH-4, Exhibit EDH-5, Exhibit EDH-6 and Exhibit EDH-8.
²³ 1986 Pa. PUC LEXIS 118 (Order entered Apr. 18, 1986).

²⁴ *Id.* at *66.

²⁵ *Id.*

²⁶ *Id.* at *68-75.

There are numerous other examples. For example, in *Application of Transource Pennsylvania LLC*,²⁷ Stop Transource – Franklin County moved to strike²⁸ the testimony of Commissioner Cawley on behalf of Transource, asserting that his testimony was a legal opinion offering conclusions of law. In that case, ALJs Barnes and Calvelli denied the motion to strike.²⁹ In doing so, they noted that, to the extent some of the proffered testimony did constitute a legal opinion, such testimony would not form the basis for any findings of fact in any recommended decision that would be issued in that proceeding.

Moreover, in this proceeding, the OCA witness, Scott Rubin (who is an attorney), was permitted to offer extensive testimony providing his opinion and interpretation of the applicable law and legal policy.

The ALJs and the Commission should consider Commissioner Cawley’s testimony and determine the appropriate weight to give to it. If such testimony is struck now, however, the fact finder could be denied the opportunity to review and consider important background and policy considerations when analyzing these issues.

C. The Environmental Stakeholders Have Had Notice And The Opportunity To Be Heard With Respect To Commissioner Cawley’s Rebuttal Testimony.

The Environmental Stakeholders assert that it is unfair to accept the Contested Portions of Commissioner Cawley’s rebuttal testimony, since such testimony constitutes “an additional, pre-emptive legal brief.”³⁰ **They are wrong.** Not only is Commission Cawley’s testimony related to policy considerations distinct from a brief outlining legal arguments (discussed above), but the Environmental Stakeholders have had notice and the opportunity to respond in full to

²⁷ PUC Docket Number A-2017-2640195, *et seq.*

²⁸ <http://www.puc.state.pa.us/pcdocs/1598267.pdf>. That motion was opposed by Transource.

<http://www.puc.state.pa.us/pcdocs/1598646.pdf>.

²⁹ <http://www.puc.state.pa.us/pcdocs/1600553.doc>.

³⁰ Motion to Strike at 8-9.

Commissioner Cawley’s Rebuttal. They will have a separate opportunity to respond in full to PGW’s Brief. Commissioner Cawley’s rebuttal does not impact due process considerations.

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it.³¹ Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard.³² Section 5.403(b) of the Commission’s regulations requires presiding officers to control the receipt of evidence so as “to direct and focus the proceedings consistent with due process.”³³

Regarding due process, the schedule provides the Environmental Stakeholders with notice and the opportunity to be heard with respect to Commissioner Cawley’s rebuttal testimony. The Environmental Stakeholders have had adequate time and an opportunity to respond to Commissioner Cawley’s rebuttal testimony. They had the opportunity to – and in fact did – submit surrebuttal testimony of Dr. Hausman (Environmental Stakeholders St. No. 1-SR) on Friday, July 24, 2020.

This is **not** a situation involving “surprise” or “trial by ambush.” To the contrary, Commissioner Cawley’s rebuttal testimony explains the underlying legal context which supports his position that PGW should not be required to, among other things, produce a CBP as a policy matter. This is fair and equitable, since it gives the Environmental Stakeholders information on the underlying legal context of Commissioner Cawley’s testimony BEFORE the hearing and briefing in this proceeding. Through surrebuttal testimony, the Environmental Stakeholders had the opportunity to respond to Commission Cawley’s testimony. During the hearing and briefing, the Environmental Stakeholders will be able to further respond to Commissioner Cawley’s

³¹ *Schneider v. PUC*, 479 A.2d 10, 15 (Pa.Cmwlth. 1984), *citing Fusaro v. PUC*, 382 A.2d 794 (Pa.Cmwlth. 1978).

³² *Schneider v. PUC*, 479 A.2d 10, 15 (Pa.Cmwlth. 1984).

³³ 52 Pa.Code § 5.403(b).

testimony and any legal arguments advanced by PGW, respectively. By giving notice of the legal context relied upon BEFORE the hearing and briefing, Commissioner Cawley is giving the Environmental Stakeholders **more** notice and time to respond to the legal context relied upon by Commissioner Cawley. This is an advantage, not a detriment, to the Environmental Stakeholders.

D. Commissioner Cawley’s Rebuttal Testimony Is NOT Based On Impermissible Hearsay

Consistent with long-standing practice before the PUC, Commissioner Cawley identified the underlying legal context by qualifying phrases.³⁴ These phrases include “I am informed by counsel,” “Upon the advice of counsel,” etc. The text following these phrases is **not** hearsay, since that text is not being offered for the truth of the matter being asserted.³⁵ That text is presented so as to explain the underlying basis for Commissioner Cawley’s positions on the policy matters³⁶ presented by Dr. Hausman.

E. Commissioner Cawley’s Rebuttal Testimony Does Not Challenge The ALJs’ Interim Orders on Discovery.

As the presiding officers are well aware, the Commission, not the ALJs, is the ultimate fact-finder;³⁷ it weighs the evidence on a *de novo* basis and resolves conflicts in testimony. The Commission has authority and jurisdiction to evaluate the lawfulness, justness, and reasonableness of PGW’s existing and proposed rates.

³⁴ Commissioner Cawley is an attorney. He is capable of expressing his own legal opinions. He is not acting as a “conduit for PGW’s Counsel’s legal opinions.” Motion to Strike at 9. However, as explained herein, Commissioner Cawley is offering policy opinions, not legal testimony.

³⁵ Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. *See* Pa. Rule of Evidence No. 801.

³⁶ The comment to Rule 705 explains if the expert relied upon non-admissible hearsay in forming their opinion, then the underlying hearsay is admissible for the purpose of understanding the basis for the expert's opinion but not for the purpose of being used to prove the truth of the matter asserted therein. Pa. Rule of Evidence No. 705 at Comment.

³⁷ 66 Pa.C.S. § 335.

The Environmental Stakeholders misread the ALJs' Interim Orders as having conclusively determined that the Commission has jurisdiction to consider climate change and other environmental factors. That is **not** the holding of those Orders.

- The July 13th Interim Order³⁸ sustained the Environmental Stakeholders' objections to discovery from PGW. That order indicated that the Environmental Stakeholders did not have to divulge legal theories and analysis before the briefing period. Nothing in that Interim Order prevents Commissioner Cawley from stating the underlying legal context that relates to his policy opinions.
- The July 7th Interim Order³⁹ excluded part of Dr. Hausman's direct testimony. That order excluded any direct testimony from Dr. Hausman pertaining to changing PGW's business model to electrification. As to the remaining parts of his testimony, that order holds that the ALJs and the Commission should consider Dr. Hausman's direct testimony and determine the appropriate weight to give to it.⁴⁰
- The ALJs also dismissed PGW's objections to discovery from the Environmental Stakeholders.⁴¹ None of PGW's responses are referenced in Dr. Hausman's direct testimony.

Thus, Commissioner Cawley's testimony clearly does not challenge the ALJs' Interim Orders, as these Orders have not precluded Commission Cawley from identifying the basis of his opinions.

IV. CONCLUSION

PGW requests that the Presiding Officers deny the Environmental Stakeholders' Motion to Strike. PGW is entitled to submit rebuttal testimony in response to claims and requests made as to the policy matters raised by Dr. Hausman on behalf of the Environmental Stakeholders. 66 Pa.C.S. § 332.

³⁸ Order On Philadelphia Gas Works' Motion To Dismiss The Objections Of Environmental Stakeholders' To Its Interrogatories, Set I, dated July 13, 2020. <http://www.puc.state.pa.us/pdocs/1670039.docx>.

³⁹ Order On Pgw's Motion In Limine Regarding The Direct Testimony Of Ezra D. Hausman, Ph.D., Submitted By The Environmental Stakeholders, dated July 7, 2020. <http://www.puc.state.pa.us/pdocs/1669004.docx>

⁴⁰ *Id.* at 5 ("However, while the weight of such evidence will be determine after the hearing, environmental considerations, including methane and other leaks that may exist in the infrastructure, are relevant to determining whether the rates increase sought by PGW for infrastructure work is just and reasonable. Additionally, whether the proposed rate increase and associated infrastructure work present a risk of stranded assets given regional environmental planning issues are also relevant to the reasonableness of the proposed rates, rules and regulations.").

⁴¹ June 25 Hearing Transcript.

The ALJs and the Commission should consider Commissioner Cawley's rebuttal testimony and determine the appropriate weight to give to it. If such testimony is struck now, however, the fact finder could be denied the opportunity to review and consider important background and policy considerations when analyzing these issues.

Respectfully submitted,

/s/ Kristine E. Marsilio

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Dated: July 27, 2020

Verification

I, **Kristine E. Marsilio** state that I am an **Attorney of Record** for Philadelphia Gas Works (“PGW”) and that as such I am authorized to make this verification on its behalf. I hereby state that the facts contained in the foregoing **Answer** are true and correct (or are true and correct to the best of my knowledge, information and belief). I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

/s/ Kristine E. Marsilio

Kristine E. Marsilio, Esq.
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